IAFL EUROPEAN CHAPTER YOUNG LAWYERS' AWARD 2024

Mona is Spanish and her husband Franck is German, they were living in London and have two children:

- **Clara, 10 years old**
- **Leo, 8 years old**

They divorced in England and in their divorce agreement it was acted that:

Mona would relocate with the children to Madrid. Franck will have an access right during all the Spanish school holidays. Franck would pay a €500 child maintenance per child per month.

Franck is complaining because Mona does not respect his access right and he has not been able to enforce his access for the last school holidays.

Mona is complaining because Franck has stopped paying her the children maintenance and he currently owes her a few months of maintenance.

What could be done to help?

- **Franck to enforce his access right.**

N.B. It is unclear from the case study whether Franck remains living in London, but for the purposes of this composition it has been assumed that he does.

1. Firstly, if Franck had legal representation or took legal advice at the time where he and Mona were negotiating their "divorce agreement", he would have been advised by his English solicitors that in England there are separate proceedings for each issue arising out of a divorce. This means that, if the parties only apply for divorce but make no other applications, the court will simply sanction the dissolution of the marriage, but it will not make any consideration as to the finances or the arrangements for the children – it is up to the interested party to make an application for the court to tackle these issues, absent which it will be assumed that the parties will be capable of reaching an agreement without the court's intervention.

2. The case study simply says that there was a "divorce agreement". There are two possible scenarios arising out of that statement.
    a. The first scenario is one where the English court only intervened for the purpose of dissolving the marriage, and that all other issues were discussed and agreed by the parties (either directly, by attending a non-court dispute resolution alternative such as mediation, or through their respective solicitors), but that there is no court order in place.
        i. In this scenario, Franck and Mona would have reached an agreement as to children's arrangements and they would have reflected the agreed terms in a Parenting Plan or a similar informal written document. A Parenting Plan is not legally binding under English law, and therefore it cannot be enforced if a parent does not comply with the agreed terms.
        ii. The parties would have had the possibility of formalising their agreement and making it legally binding by submitting a joint application under section 8 of the 'Children Act 1989' (using form C100 and following the procedure outlined in Part 12 of the Family Procedure Rules) accompanied by a draft consent order reflecting the terms of the agreement. Nonetheless, this is not necessarily a rubber-stamp exercise as the court has a duty to consider and protect the best interests of the concerned children. Therefore, the court *can* ask the parties to attend a hearing, *can* override the parties' agreement and make different arrangements for the children, and *can* direct the involvement of CAFCASS to investigate the background of the family and make recommendations to the court as to what is in the children's best interests.
        iii. In any event, the possibility of Franck and Mona submitting such a joint application *now* is unrealistic because (a) if Mona is not complying with Franck's visitation rights under the agreement, she is unlikely to want to make the agreement legally binding, and (b) if Mona and the children have already relocated to Spain, the English court is likely to have lost jurisdiction over the children. Section 2(1)(a) of the 'Family Law Act 1986' makes clear that the court does *not* have jurisdiction to make an order under section 8 of the 'Children Act 1989' unless (i) it has jurisdiction under the '1996 Hague Convention on the International Protection of Children of 19 October 1996' (which refers to the children's habitual residence, save for exceptions that are not relevant to the case study) or (ii) the 1996 Convention does not apply but

the children concerned are habitually resident or present in England. Given that the children at this stage are neither habitually resident nor present in England, the English court does *not* have jurisdiction to make a child arrangements order (whether by consent or on Franck's sole application).

iv. Franck, therefore, would need to start fresh proceedings in Spain, as the children's new place of habitual residence. The procedure is outlined in Articles 748 *et seq.* of the Spanish Civil Procedure Rules *(Ley de Enjuiciamiento Civil)*. There, the court would look at the children's best interests when considering whether to grant Franck the visitation rights he seeks under Article 92 of the Spanish Civil Code. The public prosecutor *(Ministerio Fiscal*) would necessarily intervene in its role as protector of the best interests of the children. Although the Spanish court would be likely to place some weight on the agreement as showing the arrangements that the parties thought were in their children's best interests at the time, the court would not be bound by it.

b. The second scenario is one where Franck and Monica did ask the English court to formalise their child arrangements agreement into a legally binding consent order, using the procedure outlined above.

i. If the order was made *before* 11pm on 31 December 2020, or was made *after* that date but the proceedings were instituted before that deadline, Article 67 of the 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' provides that its recognition is subject to the provisions of 'Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000'. Under Article 21 of the Regulation, the order shall be capable of recognition in Spain without any special procedure, so Franck can make an application before the local court in Spain for a decision that the order be recognised. The grounds for non-recognition are quite limited and it is unlikely that any such exceptions would apply in this case, particularly where the order was made by consent. Article 41 provides that rights of access such as those that Franck is seeking to enforce are recognised and enforceable without requiring Franck first to obtain a declaration of enforceability; and there is no

possibility of Mona opposing its recognition. Franck would need to obtain an authenticated copy of the judgment (translated into Spanish by a sworn translator appointed by the Spanish Ministry of Foreign Affairs) and a certificate from the English judge that issued the order using Annex III. That will make the order enforceable in Spain in the same conditions as if it had been delivered in Spain (Article 47) and, if the order lacks specificity, Franck can ask the Spanish court to make practical arrangements for organising the exercise of his right of access (Article 48).

ii. If the recognition and enforceability of the order does not fall within the transitional arrangements for the implementation of 'Brexit' because the order was made, or the proceedings instituted, *after* 11pm on 31 December 2020, Franck will need to rely on the 1996 Convention, which both the UK and Spain have ratified, and which scope includes rights of access (Article 3.b). The Convention provides for the recognition of all measures by operation of law, with only limited exceptions (Article 23), once the measures are declared enforceable or registered for the purpose of enforcement in Spain (Article 26), which will give the measures the same status as if they had been taken by the Spanish authorities (Article 28). The central authorities of the UK and Spain can cooperate under the auspices of Article 35 to ensure the effectiveness of those rights. Although, in theory, Mona *could* apply for a variation of the terms of the order using the procedure set out in Article 775 of the Spanish Civil Procedure Rules, given that Spain has gained primary jurisdiction over the children after their relocation, it is unlikely that such a variation will be granted *unless* Mona can show there are new circumstances that were not foreseeable at the time the English order was made by consent, and that are relevant enough to render the terms of the English order no longer appropriate. The Spanish court should be slow to vary the terms of the order, particularly if such an application is made shortly before the relocation occurs, as recommended by the 'Practical handbook on the operation of the 1996 Hague child protection convention' (see Chapter 13, section A, subsection (d), paragraph 13.27).

- **Mona to enforce her maintenance.**

3. Again, this will depend on whether an order was obtained in England (making the agreement legally binding) and, if so, on when said order was obtained.
    a. If an order was not obtained, then Mona does not have a maintenance order to enforce and she will need to file a fresh claim for child maintenance, without her being able to recover any arrears due under the agreement.
        i. Mona may wish to claim child maintenance from Franck in England, as his place of habitual residence. Given that Mona, as the person with care, and the so-called (for child maintenance purposes) "qualifying children", are all living outside of the UK, the 'Child Maintenance Service' does *not* have jurisdiction to make an assessment (section 44.1 of the 'Child Support Act 1991'). This means the English court is the authority that has jurisdiction to make orders for child maintenance, should Mona decide to pursue the claim in England. Mona would have to file an application under Schedule 1 to the 'Children Act 1989'. This piece of legislation gives the court the power to order not only periodical payments for the benefit of the children, but also to make orders covering the children's educational expenses, settling or transferring property to the children or to the person with care, or for the payment of a lump sum to meet one-off capital items for the children's benefit (e.g., medical costs, furniture, vehicles). Any order for child maintenance will have effect from the date the application was filed by Mona and will prevent either party from making an application for a Child Maintenance Service assessment for *only* a year, in the event that the CMS were to regain jurisdiction (for example, if Mona and the children were to relocate back to the UK). Generally speaking, an English child maintenance order must not extend beyond the child's 18th birthday unless there are special circumstances, or the child is to continue his or her full-time education. An order made under Schedule 1 to the 'Children Act 1989' will be automatically enforceable in England against Franck's English income and assets (and Mona would be able to use the 2007 Hague Convention for that purpose too, which provides for the creditor to be able to apply for the enforcement of a decision made in the requested State). Mona would also benefit from Franck's legal duty, under English law, to provide full and frank

disclosure throughout the proceedings – a legal duty that is not replicated in Spanish law. Mona could also apply for a maintenance order under the 2007 Hague Convention – more on which below.

ii. Mona is also able to make a claim for child maintenance in Spain under Articles 93 and 142 *et seq.* of the Spanish Civil Code, as her and the children's place of habitual residence. She would have to follow the procedure set out in Article 769 of the Spanish Civil Procedure rules. She may wish to bring the proceedings in Spain as she is likely to be more familiar with the language, process and legal principles – and she may also be conscious that legal fees in England, if she seeks representation, are likely to be much higher. However, assuming that Franck does not have any assets or earnings in Spain, enforcement might be difficult. Mona may be entitled (depending on her own financial resources) to apply to the Spanish Maintenance Fund (*Fondo de garantía del pago de alimentos)* for an advance payment of EUR 100 per month for up to 18 months, which will need to be reimbursed to the Fund once the order is enforced against Franck. Mona would be able to enforce a Spanish child maintenance order in England against Franck using the '2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance', which both the UK and Spain have ratified. The procedure is set out in Part 34 of the 'Family Procedure Rules'. The Convention is engaged in its entirety when it comes to child maintenance, up to the default age limit of 21 years (Article 2.1.a). Mona, as the creditor, would be able to apply for the recognition and enforcement of the Spanish order in England following the procedure of Article 23 if the requirements of Article 20 are met; Article 34 sets out a variety of enforcement measures. Mona could also use the Convention to apply for England to make a decision as to child maintenance (Article 10.1.c), and to then enforce it. Franck would be able to counter-apply for a modification of the decision (Article 10.2.c). Mona could also make use of the convention to obtain information about Franck's income and assets (Article 6.1) before proceeding with the enforcement.

b. If an order was obtained in England when the parties reached an agreement:

i. If Mona wishes to enforce it in England, then she can either use the 2007 Convention as outlined above, or enforce directly in England under Part 33 of the 'Family Procedure Rules' by making an application for a specific

enforcement measure (an attachment of earnings order, a warrant of control, a third party debt order, a charging order or a judgment summons) or for such an enforcement measure as the court considers appropriate.

ii. If Mona wishes to enforce the order in Spain (for example, because Franck has assets or income there), how to enforce it will depend on *when* the order was obtained, or the proceedings instituted.

    1. If the order was made *before* 11pm on 31 December 2020, or was made *after* that date but the proceedings were instituted before that deadline, Article 67 of the 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' provides that its recognition across Member States is subject to the provisions of 'Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations'. As the UK, in its historic and ongoing refusal to apply foreign law to family law matters, was never bound by the '2007 Protocol on the Law Applicable to Maintenance Obligations', the recognition and enforcement of such decisions is regulated in Section 2 of Chapter IV of the Regulation. The order must be recognised in Spain without any special procedure, so Mona could apply to the Spanish court for a decision that the English order be recognised and declared enforceable (Articles 23 and 27) and in all likelihood that decision would be granted in view of the stringent grounds of refusal of recognition (Article 24), none of which would appear to be applicable to the case study. Again, Mona would need to provide an authenticated copy of the order and an extract of the decision issued by the English court using Annex II (Article 28). The declaration of enforceability should be issued by the Spanish court in less than 30 days, without Franck having an opportunity to make submissions (Article 30), although once the decision is made either party can appeal it. If the English order is declared enforceable, then Mona would be able to enforce it in Spain as if it was a Spanish decision.

2. If the recognition and enforceability of the order does not fall within the transitional arrangements for the implementation of 'Brexit' because the order was made, or the proceedings instituted, after 11pm on 31 December 2020, Mona will need to rely on the provisions about recognition and enforcement of the 2007 Convention, as above (see 3.a.ii.2).

II. Franck has learnt that Mona is now living as a couple with Anna, he wants to file a petition to change the custody and the maintenance of the children. Where and how should he file his petition?

4. As above, Spain appears to be now the children's place of habitual residence. As such, Article 7.1 of 'Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)' grants jurisdiction to the Spanish court in matters of parental responsibility. The case would be allocated to the local court where Mona and the children live.

5. Franck would need to file a single set of proceedings in relation to the children's custody and maintenance, applying the legal principles set out in Articles 92, 93 and 142 *et seq.* of the Spanish Civil Code and using the procedure set out in Articles 748 *et seq.* of the Spanish Civil Procedure Rules and in Articles 85 *et seq.* of the Voluntary Jurisdiction Act 15/2015.

6. The Spanish court would consider the children's best interests when making a decision on the issue of custody (which, in this case, would also involve their relocation back to the UK), but unless safeguarding issues can be shown in respect of Anna, the court is unlikely to change the custody arrangements simply because Mona is now in a same-sex relationship, as that would clearly amount to discrimination and a breach of human rights (in particular, of Articles 8, right to respect for private and family life, and 14, prohibition of discrimination, of the 'European Convention on Human Rights').

7. As to child maintenance, the Spanish court would assess it in proportion to the children's needs and the parties' respective financial positions (Article 146 of the Spanish Civil Code),

aided by the tables published by the *Consejo General del Poder Judicial*, which in any event do not bind the court.

If Mona moves with the children to Geneva, after Franck has filed his application and before the hearing does it changes something in the case?

8. A further relocation of the children from Spain to Switzerland without Franck's consent would be a wrongful removal and thus engage the '1980 Hague Convention on the Civil Aspects of International Child Abduction', because at the time of the removal Franck had rights of custody and they were being exercised (Article 3). The agreement that the children shall live with Mona does not entitle her unilaterally to remove them from the place of habitual residence. Under Spanish law (as the law of the children's place of habitual residence), Franck has joint parental responsibility over the children (Article 154 of the Spanish Civil Code) and thus the right to veto the children's removal from their place of habitual residence, and that is equivalent to having a right of custody for the purposes of the Convention (Article 5).

9. Franck could use the Convention to secure the children's return to Spain (Article 8). Switzerland shall order the return of the children to Spain expeditiously (Article 12) unless Mona can show that an Article 13 defence applies. Franck could also use the Convention to secure his rights of access pending the return and once the return takes place (Articles 7.f and 21); if interim contact is deemed to be urgent, Article 11 of the 1996 Convention can also be used to make such an interim order, which will lapse once Spain takes the necessary measures and, if any other measures of protection to ensure the safe return of the children are necessary, the 1996 Convention will ensure that they are recognised by operation of law in all Contracting States (see Chapter 13, section A, subsection (a), of the 'Practical handbook on the operation of the 1996 Hague child protection convention').

10. If Mona wishes to relocate yet again with the children from Spain to Switzerland and Franck, as joint holder of parental responsibility, does not consent to the relocation, she will need to seek the Spanish court's authorisation and file a petition under the Voluntary Jurisdiction Act 15/2015. The best interests of the children will be the court's paramount consideration. Unlike in England, there is a judicial trend in Spain to granting ‘leave to remove’ applications where one party, as in this case, has custody or is the children's primary carer,

prioritising that parent's right to choose his or her place of residence; particularly in circumstances such as this, where the non-resident parent lives in a third jurisdiction, the Spanish court is likely to conclude that Franck can maintain his relationship with the children and his rights of access to them as much in Switzerland as in Spain, and that therefore the relocation can proceed.

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